No. 89-1671

In The

# Supreme Court of the United States

October Term, 1989

CITY OF COLUMBIA
and COLUMBIA OUTDOOR ADVERTISING, INC.,

*Petitioners,*

vs.

OMNI OUTDOOR ADVERTISING, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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## RESTATED QUESTIONS PRESENTED

I. Whether the conclusion of the Court of Appeals that sufficient evidence existed to implicate the City of Columbia in an antitrust conspiracy with Columbia Outdoor Advertising warrants further review by this Court?

II. Whether the conclusion of the Court of Appeals that sufficient evidence existed to support the jury verdict that COA's actions were within the "sham" exception to *Noerr-Pennington* warrants further review by this Court?

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## STATEMENT OF THE CASE

As presented by Petitioners, this case involves nothing more than "successful lobbying" by a monopolist to prevent a potential competitor from entering its market. This is emphatically not so.[1] During a one month trial the Respondent undertook to prove the existence of a corrupt, anticompetitive conspiracy between the mayor and other officials of the City of Columbia (City) and Columbia Outdoor Advertising, Inc. (COA). The jury expressly found that this corrupt conspiracy existed.

As is discussed more fully below, the evidence showed that COA had given the Mayor and members of City Council free or reduced rate billboard space. It had given politicians preferred billboard locations. COA's president, Mr. Cantey, admitted that it gave benefits to politicians with the clear understanding that favors would be provided in return. A reasonable implication of this testimony was that free billboards and preferred locations would be available to the Mayor and Council members only if the favors COA requested were provided. As a monopolist COA bargained from a position of strength.

COA had successfully maintained monopoly status in Columbia for some years. COA's facilities in Columbia were dilapidated. The trial established that COA "snitched" billboards. As used in this context, "snitching"[2] is the practice of selling billboard space to a

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[1] The Petitioner's Questions Presented are drawn so as to appear to answer themselves. Unfortunately for Petitioner they have nothing to do with this fact-intensive case; Respondent has therefore restated questions presented in a more realistic form.

[2] The word "snitching" came from COA's own records, found in discovery.

national advertiser and then papering over his advertisement with a local advertiser's message. This allows double billing for the same space or allows for a well-placed political advertisement.

In spite of these defects, because COA had no significant competition, it still maintained a 95 percent share in the Columbia market.

The evidence established that before OMNI showed interest in the Columbia market, another billboard company had planned to enter the Columbia market. In a letter written to that company, COA's President, Mr. Cantey, boasted of his longstanding relationship with the mayor and City Council. He indicated that his son was drafting an ordinance restricting new billboards in the city. He stated that the ordinance would be passed if he requested it. The other company abandoned its plans to build a plant in Columbia.

The facts showed that City officials had agreed, even before OMNI's appearance, to give Mr. Cantey whatever he wanted, whenever he wanted it. At his request, they deliberately tailored restrictions to favor Mr. Cantey's interests and repeatedly expanded and narrowed billboard control at Mr. Cantey's request.

In fact, at the outset of Mr. Cantey's campaign against OMNI he called upon City Council to adopt an immediate and patently illegal moratorium against new billboard construction. The moratorium applied even where OMNI already had permits to build signs. It was adopted over the City Attorney's objection that it was unconstitutional under directly applicable South Carolina Supreme Court precedent. The South Carolina courts struck down the moratorium.



These facts are discussed in more detail below. They clearly support an inference that even the passage of the restrictive ordinances that forced OMNI out of the Columbia market were due to something far more sinister than "successful lobbying" by COA, as Petitioner suggests. As stated above, OMNI undertook to prove a corrupt conspiracy between the City and COA. The jury expressly found that such a conspiracy existed.

> "Do you find that the Defendants, Columbia Outdoor Advertising, Inc., and the City of Columbia conspired in restraint of trade against the Plaintiff, OMNI Outdoor Advertising, Inc. Answer: Yes." (Tr. 2502).
>
> "Do you find that the Defendants, Columbia Outdoor Advertising, Inc., and the City of Columbia conspired against the Plaintiff, OMNI Outdoor Advertising, Inc. to monopolize the outdoor advertising market in Richland and Lexington Counties? Answer: Yes." (Tr. 2502).

Instead of the case painted by Petitioners, the real case involves an unusual, if not indeed unique, set of facts. The officials who ran the government of the City and the officers owning and running the private, closely-held COA had a secret, illegal and continuous agreement to utilize mutual resources, including perverted governmental powers, to benefit each other both financially and politically by excluding COA's competitors and by providing unfair advertising advantages to incumbent Councilmen making them more difficult to defeat. The case is literally not like any other case cited by Petitioners; *Parker v. Brown*, 317 U.S. 341 (1943) does not apply. In *Parker* this Court specifically noted that its holding did not provide antitrust immunity when there was a "question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of

trade." (*Id.* at 351-352).[3] The jury here found the City to have been such a participant. Respondent OMNI believes that ought to end the matter. However, the discussion below will demonstrate how the record clearly supports the jury verdict.[4]

From the very start of this action it was well recognized and held by the lower court that the acts of passing various ordinances constitute but overt acts of the conspiracy.[5]

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[3] Petitioners nowhere refer to this aspect of the *Parker* decision.

[4] OMNI will cite to the record below; in keeping with the tenor of Rule 19.1, OMNI has not sought certification of the record, which occupies 12 volumes and runs to a total of 3,811 pages.

[5] Judge Lloyd F. MacMahon recognized this in this very case by his orders of July 13, 1983, and September 7, 1983, denying the Defendants' motion to dismiss. As he wrote in his Order of July 13, 1983 (*OMNI Outdoor Advertising v. Columbia Outdoor Advertising, Inc.*, 566 F.Supp 1444, 1446 (D.S.C. 1983)):

> "Fortunately, we are not required to answer the nice question whether the cited sections of the South Carolina Code satisfy the *Boulder* requirements. The complaint in this case simply does not allege that the three ordinances passed by the City Council violated the antitrust laws; rather, it alleges that defendants conspired to violate Sherman Act §§1 and 2 and that the ordinances were three of the many overt acts committed in furtherance of the conspiracy. In other words, the evil plaintiff complains of is not the ordinances standing alone but rather the conspiracy. It is within the realm of possibility that evidence upon a trial might show corruption or bad faith anticompetitive actions on the part of city officials, *see generally* P. Areeda, Antitrust Law §203.3c (Supp. 1982)." (Tr. 44).



The facts of the conspiracy in this case center upon a standing agreement between the City and COA to the effect that the City was to do everything in its power to insure and protect COA's monopoly position in the area. This prior agreement was implemented, *inter alia*, (1) by the Defendants' devising a plan and agreeing to stop OMNI through the use of unquestionably illegal moratoriums; (2) by shutting OMNI out of the decision-making process; (3) by giving COA advance warning of the imminent passage of COA-drafted ordinances; and (4) by thereafter imposing spacing and location requirements through new ordinances which permitted the existing COA plant to remain intact while forbidding OMNI from placing its boards competitively. At the same time COA was given the opportunity by the City to "sneak in" new locations. This was graphically illustrated by Plaintiff's demonstrative Exhibits Nos. 55 and 57, (Tr. 2756 and 2759). Because there was no competition at key locations during this same time period, COA was selling the key locations twice, "double billing" (Tr. 921). In order to further stop OMNI, COA offered artificially low rates (Tr. 1091, 2755). The result of this "freezing out" of OMNI was OMNI's inability to obtain sign locations and to sell space competitively, which in turn damaged OMNI.

In 1980 another billboard operator, Naegele, thought about coming into Columbia because of COA's very dilapidated and outdated plant. (Tr. 3602-3605). In response to the Naegele threat in 1980 COA got an agreement with the City to pass a restrictive billboard ordinance at any time. Mr. Cantey wrote in a letter:

> "The Mayor of Columbia and the four Councilmen are very good friends of ours. I discussed your suggestion with the Mayor about rewriting our existing sign ordinance and he promptly

said, 'no problem.' My son Jim has begun a study to determine exactly what restrictive measures we should request." (Tr. 2704) (*See also* 548-549).

When confronted with this letter Mr. Cantey, the main owner of COA, said:

"You know why I did that? To keep Mr. Naegele out. He was buying everything, Greenville, Spartanburg, Gastonia, Greensboro, Asheville, right all over me. Dooner wasn't even in it." (Tr. 549).

This shows that two years prior to OMNI's involvement in Columbia, COA and the City had a clear understanding that restrictive measures would be put into effect as soon as COA needed them to protect its position in the market.[6]

In 1982 when OMNI decided to enter the Columbia market, COA was in a secure, monopoly position in the outdoor advertising market. (Tr. 222, 301, 1511). Coupled with the agreement with the City, COA owned 95 percent of the outdoor advertising signs in the Columbia market. (Tr. 702).

Once the officers of COA got wind of OMNI's plan they began their campaign to stop OMNI. Efforts to determine how best to force OMNI out of the Columbia market were far-reaching. Mr. Cantey made trips to Baton Rouge, La. and Pensacola, Fla. to investigate how to sabotage and stop OMNI. (Tr. 551, 2710). After discussing COA's situation with his outdoor advertising friends, Mr. Cantey wrote that the way to stop Mr. Dooner and OMNI was to get a city moratorium on signs and then get a city

[6] *See* Fourth Circuit Opinion, Pet. App. 13a.



ordinance controlling the locations of signs. Some of Mr. Cantey's memos show:

*Memo dated 12/11/81 – visit with Gerry Marchand* "Put in spacing *500'* now." *"Consider* moratorium." (Tr. 2722).

*Memo regarding visit with Naegele in Spartanburg* "Put in sign ordinance as soon as possible. 1,000." (Tr. 2698).

It is obvious that as part of the plan COA called upon its agreement with the City in order to get a restrictive moratorium and an ordinance. This would damage OMNI but not COA. (Tr. 1088). Mr. Cantey called on his political friends as he had in the past. He visited his good friend the Mayor of Columbia at his office in order to discuss sign ordinances and OMNI. (Tr. 2081). Mr. Cantey had given the Mayor six free billboards in his first race. (Tr. 2056-2057). The meeting was followed by a dinner with the Mayor in February, 1982, where COA's problem was again discussed. (Tr. 2695).[7]

The behavior of the Mayor subsequent to these meetings shows his efforts to protect COA. At one City Council meeting OMNI officials were singled out and unfairly attacked by the Mayor in open session. (Tr. 224). On March 24, 1982, City Council and the Mayor passed a moratorium on billboards, banning the construction of billboards within the city limits without Council's express consent. (Tr. 3616). They were informed by City Attorney, Roy Bates, that these actions were unconstitutional and illegal. (Tr. 389-390, 409). The Council passed the moratorium anyway and predictably the State court held that their actions were unconstitutional. (Tr. 2658-2663). Mr.

[7] *See* Fourth Circuit Opinion, App. Pet. 14a.

Cantey admitted the ordinances were of benefit to COA. (Tr. 1173).[8]

Even before the first moratorium was declared illegal City Council gave first reading to a second moratorium. (Tr. 299, 2649). This had the effect of keeping OMNI's business at a standstill. (Tr. 1255). The Mayor's direct involvement in this second moratorium is evidenced in a City of Columbia Inter Office Memo. (Tr. 3204). Even after the declaration of unconstitutionality, the City dragged its feet about permitting OMNI to construct signs for which it had already leased sites. (Tr. 390-391).[9]

As agreed to by the City and COA, the final restrictive ordinance, passed on September 22, 1982, clearly protected COA's dominant position.[10] (Tr. 338-339). Prior to passage of this ordinance, OMNI tried to give input into the process but was consistently thwarted. (Tr. 393-394, 830-835).

A comparison of the notes made by city officials after meetings shows that the demands of COA made up the ordinance. COA demanded that the distance between signs in M-1 and M-2 zones be increased from 750 feet to 1,000 feet, which was accordingly done. (Tr. 3785). OMNI objected to having any distance requirement on the opposite side of the streets. COA indicated it had no problem with such a requirement and Council passed it. (Tr. 2198-2199). The September 22, 1982, ordinance is unreasonably and unusually strict and it is tailored to insure that OMNI could not get necessary sign locations in the

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[8] *See Id.* at 14a-15a.

[9] *See Id.* at 15a.

[10] *See Id.* at 16a.



critical Columbia core area. (Tr. 835-847). Another memo from the City Manager to City Council illustrates the unfair bias in favor of COA and the nonaccess to the process of OMNI. (Tr. 3804-3805).

A closer look at the time period between March, 1982, and October, 1982, clearly shows the conspiracy and the overt acts in furtherance of the conspiracy. A draft of a moratorium was written by Councilman Patton Adams on the back of an agenda – not the usual way of writing ordinances – the morning of March 10, 1982, the day of the first reading of the moratorium. (Tr. 1901). That day, first reading was given to the following moratorium:

> Upon motion by Mr. Adams, seconded by Mr. Barnes, Council voted unanimously that no billboards will be constructed in the area bounded by Harden Street, the River, Heyward Street and Elmwood Avenue or in any area where a rezoning has been or shall be proposed, including the Rosewood Corridor area, without the express prior permission of City Council. (Tr. 3190).[11]

A really telltale event is that on the 9th of March, COA ran out and got from the City three new sign locations of which two were in the moratorium area. (Tr. 3187).[12] On March 24, 1982, a reworded, more restrictive moratorium was passed. (Tr. 3616).

This moratorium was much more restrictive than the one given first reading on March 10, 1982, and was intended to be. No one took credit for these changes that obviously further protected COA. (Tr. 2190). Again COA knew of the upcoming moratorium change, while OMNI

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[11] It is important to note that this draft of the moratorium did not cover all locations in Columbia.

[12] *See* Fourth Circuit Opinion, App. Pet. 14a.

did not. Between March 9, 1982, and March 24, 1982, COA obtained from the City ten new locations in the area to be affected by the new moratorium of March 24, 1982. (Tr. 3187). These were more locations than COA had obtained in all of 1982. (Tr. 3187).[13]

Other events happened during this period that show the implementation of the agreement between the City and COA to protect COA. There is the letter of February 10, 1982, where Mr. Cantey threatens Mr. Dooner:

> "At some point I think City Council will be forced to place some type of stringent restrictions on our industry." (Tr. 2695).

At the airport in Atlanta Mr. Cantey told Mr. Dooner that he was going to get "1,000 feet spacing." (Tr. 664).[14] He did just that.[15]

A review of Exhibit 21 (Tr. 3785) shows that City planners have suggested 750 feet spacing in the critical areas and same side spacing. In the final ordinance Mr. Cantey got his 1,000 feet spacing and opposite side spacing of 500 feet. (Tr. 3785). COA was protected.

The day before the final moratorium, Mr. Cantey had an appointment to see the Mayor. (Tr. 3168-3169). The next day, March 24, 1982, the original moratorium was

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[13] *See Id.* at 14a.

[14] Spacing is the key to being able to compete in the Columbia market core (downtown locations). City Exhibit 19 (Tr. 3780) shows the small area that was open to billboards. Of course these were the main arteries to Columbia. OMNI's Exhibit 55 (Tr. 2757) shows the effect of spacing; Columbia was shut down to new billboards. Mr. Cantey knew 1,000 feet spacing would kill OMNI.

[15] *See* Fourth Circuit Opinion, App. Pet. 16a.



mysteriously changed so as to be even more restrictive.[16] (Tr. 3190). The City then went into a fast track program to pass a restrictive permanent ordinance. (Tr. 1917, 2027).

Mr. Cantey, in a meeting concerning the restrictive permanent ordinance, got mad and stormed out saying he would get Council to give him 1,000 feet spacing. (Tr. 354). He did, too. The 1,000 feet spacing closed down the Columbia core area. (Tr. 872).

Consistency has always been a criterion by which to judge one's actions. Look at the City's actions during the moratorium period. Councilman Adams said billboards were despicable. (Tr. 1914). The rest of Council said they were against billboards. Yet right in the middle of all this supposed concern and hatred for billboards, on June 16, 1982, upon motion by Mr. Adams, the City granted COA a zoning ordinance change in order for COA to be allowed to build one of those billboards the City so despised. (Tr. 380, 384, 387, 1221, 1914). Again, even at this late date, we see an overt act in furtherance of the agreement to protect COA.[17]

Why was the City so willing to enter into the conspiracy to protect COA? The record is replete with COA using the power of its billboard monopoly to favor one politician, particularly an incumbent one, over another. They would give political discounts, (Tr. 2762-2782, 2821) free advertising, (Tr. 1514, 1520) and advantageously located space. (Tr. 1689-1690).[18] It only takes common sense

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[16] *See Id.* at 14a-15a.

[17] COA was even given the right to build one of those hated uni-pole signs in a historical zone. (Tr. 1544).

[18] COA even pasted over other ads which had been paid for so they could display advantageously located ads for its favorite politicians. (Tr. 1690).

to understand the importance of well-placed billboards in local elections. The local politician naturally wants to target his specific area of the city or county. How does he do that? He does that by getting a properly located billboard. (Tr. 1690). None of the other kinds of media allow for that: not radio, not television, not newspaper, not magazines, nothing else. Billboards are unique.

In return for discounted billboards, free billboards, and strategically placed billboards, COA expected to be and was paid back by the politicians.[19]

Mr. Cantey said when asked about charging one politician one rate and another a different rate:

> Q. That's not fair, charging one nothing and other ones more than your rate card; is it?
>
> *By Mr. McDonald:*
>
> Objection as leading.
>
> A. I don't know. Maybe he did him a favor.
>
> Q. Maybe he did him a favor?
>
> A. Maybe he did him a favor so he compensated by giving him a free board. I don't know if that happened. (Tr. 1206).

In discussing discounted space to politicians, Mr. Cantey Heath said:

> Q. You would expect her to do the favors you would want Lieutenant Governor Mike Daniel to do for you, too, wouldn't you?
>
> A. I would expect her to help me if I asked for it. (Tr. 1627).

The Mayor and the Councilman agreed to help COA keep out OMNI. It was the payback COA expected for their efforts in the Mayor's and Councilmen's elections.

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[19] *See* Fourth Circuit Opinion, App. Pet. 16a-17a.



Finally the story brings us to "double billing." (Tr. 921). Nothing could be more wrong. Mr. Cantey of COA said it was stealing. (Tr. 1179).

The record clearly shows a pattern and practice by COA to sell a prime billboard location to a national customer as part of his overall billboard package and then sell the same locations for the same time to a local customer or politician, covering up the national customer's sign with a local customer's or politician's sign. (Tr. 921-923). COA then would bill the national customer and the local customer for the same time and advertising space. This in effect turns a prime location into two locations (Tr. 921-923). By this practice not only was OMNI not able to match COA's distribution of locations, COA was taking OMNI customers by telling lies about which locations were available and then stealing a national customer's location and giving it to a local customer or politician. COA injured OMNI by its monopoly-empowered acts. To keep their cozy relationship of stolen profits and advantages of free (or low-cost) space, COA and the City politicians went to great lengths. They certainly, as the jury has found, would and did conspire and convert the City process into a sham.

## SUMMARY OF ARGUMENTS

Viewing the evidence with appropriate deference to the jury verdict, the Court of Appeals performed a straightforward analysis of the factual record in the case at bar. The Court of Appeals came to the conclusion that "when viewed in the light most favorable to OMNI, the evidence tends to 'exclude the possibility' that the City and COA acted independently." The Court of Appeals went on to say the evidence supports the "City and COA

'had a conscious commitment to a common scheme' designed to stifle competition and preserve COA's monopoly." (Pet. App. 17a-18a).

The Court of Appeals also performed a thorough analysis of the conspiracy exception to *Parker* immunity coming to the clear conclusion that there is no blanket protection for all "conspiracies which have some political coloration." (Pet. App. 12a). The Court went on to point out that the proven conspiracy in the case at bar is not protected. There is no appeals court case that holds *all* antitrust conspiracies involving municipalities are immune under *Parker.*

The final attack by Petitioner centers on the recognized "sham" exception to the *Noerr-Pennington* Doctrine. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931 (1988). The record, as the Court of Appeals recognized, supports a jury finding that COA's actions came within the "sham" exception. (Pet. App. 22a-23a). The evidence supports the conclusion that COA's interactions with the Mayor, members of City Council, and city officials was "nothing more than an attempt to interfere directly with business relations of a competitor." (Pet. App. 22a). Likewise, COA's actions show its purpose was to delay OMNI's entry into the market and deny OMNI meaningful access to the City's administrative and legislative fora. The evidence also shows that COA, through the City, instigated the enactment of an ordinance which was patently unconstitutional and known to be so and proceeded with frivolous litigation on the ordinance until new, COA-crafted restrictive measures could be enacted. The evidence clearly supports the conclusion that such proved actions by COA



were not genuinely aimed at procuring favorable government action but were a mere "sham" with its purpose to delay, stop and damage OMNI.

The jury has viewed the facts upon instructions as to *Parker* and *Noerr-Pennington* and found for the Respondent. The Court of Appeals has found evidentiary support for that verdict.

## REASONS FOR DENYING THE WRIT

As Respondent's Statement of the Case and Restatement of the Questions Presented illustrate, the introductory paragraphs of Petitioner's purported Reasons for Granting the Writ are designed to lead this Court to misapprehend the question present in this case.[20]

Respectfully, this Honorable Court does not sit to reverse jury decisions on the facts. Further, the discussion below will demonstrate that this case is one of very limited applicability, and that there is no conflict among the decisions of the Circuits below.

*1.* There is in fact no inconsistency between this decision of the Fourth Circuit on the one hand and the Ninth and Third Circuits on the other, as maintained by

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[20] Respondent OMNI should point out that it has taken the position that zoning laws do not constitute the kind of *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) authorization to engage in anticompetitive activity that they were found to be by the Fourth Circuit. "Lobbying" of an entity which could not legally do what was being requested through the lobbying would obviously not be protected activity under any reading of the law. Thus, such "lobbying," even if it were restricted to wholly aboveboard, legitimate activity, would give rise to liability since there would just be no *Parker* issue involved.

Petitioners in their first ground. The Ninth Circuit's position on *Parker* immunity is principally stated in the *Llewellyn* decision[21] cited in the Petition.[22]

*Llewellyn* was decided on summary judgment so far as the antitrust aspect of the case was concerned.[23] The precise *Parker* question was articulated by the Ninth Circuit, per Judge Kennedy:

> The adoption of the de facto fee schedule presents some different questions, namely whether action within the intendment of section 656.248 and entitled to *Parker* immunity loses such immunity because taken in a procedurally improper manner. We hold that such action may retain its immune character, and that it does so in this case. (765 F.2d 769, 773) (emphasis supplied).

The "procedurally improper manner" issue involved an adoption of a rate schedule having been found improper because it bypassed required rulemaking procedures of the state APA. (*Id.* at 772). The Court went on to point out that principles of federalism would militate against subjecting a state to liability from which it would otherwise be immune simply because it imperfectly exercised its

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[21] *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985) (Kennedy, J.).

[22] Petitioners also cite to *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir. 1988). The claim there was dismissed pursuant to motion, the Court depending entirely upon *Llewellyn:* "[t]his claim is also controlled by *Llewellyn*." (841 F.2d at 892.) Thus, the meaningful discussion is of *Llewellyn*.

[23] At the risk of seeming repetitive, OMNI wishes to stress that the instant case went through a month of trial and resulted in a jury decision. This distinguishes it from every single case relied upon by the Petitioners.



power under its own law. (*Id.* at 774). The reason behind this assertion, in turn, was straightforward: it is obvious that no state "authorizes" errors of fact, law, or judgment; if the Federal system were to be able to find liability because of an "unauthorized" act every time there had been a "mistake" by some state entity, both the lure of the treble damages remedy and sheer contrariness could propel many cases into the Federal court system, to the enormous detriment of "Our Federalism."

Nothing in the *Llewellyn* opinion so far as it addresses *Parker* even suggests that there is no conspiracy exception to *Parker* immunity. Instead, the *Llewellyn* opinion moves directly from *Parker* to *Noerr-Pennington*, implying directly that in fact *Parker* did not protect the Defendants:

> Appellants allege that SAIF violated antitrust laws in lobbying the OWCD to take the governmental actions here in question. SAIF and its actions in this regard may have been outside the scope of *Parker* immunity, but this aspect of the complaint fails nevertheless under the *Noerr-Pennington* doctrine.[24] (765 F.2d at 775) (emphasis supplied).

Finally, directly with regard to the conspiracy issue, the *Llewellyn* case in fact supports the position of the Fourth Circuit, since it specifically went off on the vague and conclusory nature of the provisions of the Complaint rather than the factual situation. *See Llewellyn*, 765 F.2d 769, 775.

In the case at bar there are no vague "allegations"; this is a proved and specifically found conspiracy. There is no worry about "vagueness" or lack of support, and

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[24] *Noerr-Pennington* is discussed *infra*.

bad faith was in fact proved. The *Llewellyn* case accepted[25] conspiracy as an exception to both *Parker* and *Noerr-Pennington*.

The Third Circuit's approach in *Hancock Industries v. Schaeffer*, 811 F.2d 225 (3d Cir. 1987) is even less on point. This is not the case at bar; there is no allegation in *Hancock* of conspiracy, nor any determination regarding conspiracy. There is some discussion of "ulterior" motives on the part of some governmental decision makers, but those "ulterior" motives all have to do with the governmental authority acting to benefit itself financially (not with individuals acting to benefit themselves illegally) while articulating a different reason:

> . . . the haulers suggest that the challenged exclusionary policy was adopted so that the Chester Authority would be in a position to negotiate a better contract with the City or, as the haulers put it, to extort an unconscionable price from the City. (811 F.2d at 234).

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[25] As does Professor Areeda. *See* P. Areeda & H. Hovencamp, *Antitrust Law*, §§ 203.3a, 203.3c (Supp. 1987):

> 'Conspiracy' is not necessarily inapt where the member(s) of an official agency
>
> (1) Accepts a bribe;
>
> (2) Decides out of personal bias and for no other reason;
>
> (3) Decides in favor of a personal financial interest in privity with or perhaps even closely allied to that of one or more of the plaintiff's rivals, whether on the board or not. (p. 33).

As OMNI pointed out in the proceedings before the Fourth Circuit, COA's activities with the City fit at least (2) and (3) of the above, and possibly (1), depending on one's definition thereof.



This is not the kind of situation involved here. Indeed, the *Hancock Industries* Court goes on later to exclude our kind of situation from its consideration, in its discussion of the reason the *Hallie* decision minimized the need for active state supervision of governmental activity, that being the assertion in *Hallie* that "there is little or no danger that [a municipality] is involved in a *private* price-fixing arrangement." (811 F.2d at 235, quoting *Hallie)* (emphasis in original). In the present situation, there is an existing jury-determined municipal conspiracy with private activity. The "minimal danger" came to pass, and the Fourth Circuit properly found it to be a source of liability.

The issue of "subjective motivations" which the Petitioners attempt to raise simply does not exist in the context of this case.[26] There is no split among the Circuits, and no disagreement from academic analysts, as the foregoing discussion illustrates, regarding whether a proved conspiracy (with objectively proved corrupt purpose) is or ought to be immunized by *Parker:* such a situation is not, and should not be, immunized.[27]

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[26] OMNI understands the proposition that such officials' inner thought processes should not be the trigger for antitrust liability. This case does not raise the question.

[27] *Cf., Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810 (11th Cir. 1990), *cert. den. sub nom. Halifax Hosp. Medical Center v. Bolt*, ___ U.S. ___, 58 U.S.L.W. 3694, 1990 U.S. Lexis 2287 (April 30, 1990), in which the Eleventh Circuit followed a line of its and the Fifth Circuit's cases in holding that state law did not contemplate the Medical Center's entry into a conspiracy in restraint of trade, so that a directed verdict in favor of the Defendant Medical Center on Plaintiff's conspiracy claim was erroneous. *Certiorari* had not yet been denied in this case when Petitioners' Petition was filed, and they cite it at p. 10 of the

(Continued on following page)

2. The *Noerr-Pennington* issue has also been mischaracterized by Petitioners. They again persist in ignoring the jury's findings of actual conspiracy, and want this Honorable Court to view the private parties as innocent lobbyists and the City as a "legitimately" persuaded governmental entity. They ignore the clear fact that long before this situation arose the City and COA had entered into a secret agreement outside of any legislative process to the effect that at any time COA needed it, the City would immediately use its power to stop competition against COA. They ignore the jury's determination, of course, because to accept it is to recast their second question into the form presented by the actual verdict in the case: whether conspirators with proved corrupt purpose (both for the private parties and for the public parties) should be held liable for corrupting governmental processes and using governmental power and their own monopoly power for their own anticompetitive and monopolistic ends while excluding Plaintiffs from access to that same governmental power and the same market.

COA was not engaging in petitioning – they were simply implementing the terms of the long-standing conspiracy with the City. When members of the governmental entity, for reasons of their own personal gain – both financial and political – not related to the public

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Petition for the proposition that the Eleventh Circuit had applied the conspiracy exception. The citation is accurate so far as it goes, although it does not highlight the somewhat different modes of analysis used by the Eleventh and Fourth Circuits to arrive at the same end; more to the point, Petitioners fail to note, again, that *Parker* itself is the source of law involved.



welfare, join with private parties to restrain trade and monopolize, the First Amendment offers them no shelter. The cases cited by the Petitioner as being putatively contrary to the Fourth Circuit's approach in this case in fact say nothing to the contrary.

The principal case upon which Petitioners rely is *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). In that case the Court was careful to exclude the exact situation found by the jury to exist in the case at bar. The essence of that case, as the Court saw it, was that certain persons persuaded a member or members of a legislative body to support their cause. (516 F.2d at 230). The Court specifically distinguished, *inter alia*, a case in which an official of the FDA was alleged to be a co-conspirator and potential liability was upheld (*Israel v. Baxter Laboratories, Inc.*, 151 U.S.App.D.C. 101, 466 F.2d 272 (1972)), precisely because it involved the very situation found here:

> . . . the court viewed the complaint as alleging that the real purpose of defendants was 'to preclude, not induce, fair FDA consideration of the safety and efficacy of plaintiff's drug' (*id.* at 279), thus bringing the case within the sham exception. (516 F.2d at 230).

In the case at bar, the real purpose of the defendants was to block fair consideration by the City Council of the merits of any entity's position and to maintain COA's position in the market. They succeeded and grievously injured Plaintiff in its attempted entry. The District Judge instructed the jury, as the Fourth Circuit pointed out (Pet. App., p. 23a), that Defendants would not be protected "[i]f you find Defendants conspired together with the intent to foreclose the Plaintiff from meaningful access to a legitimate decision making process with regard to the

ordinances in question." Nothing in *Metro Cable* is to the contrary.

Petitioners in their footnotes 14 and 15 (Pet., p. 15) cite a number of cases they claim to be contrary to the Fourth Circuit's position in the case at bar. It is not so, as brief case-by-case discussion will illustrate. The cases are considered in the order the cases are raised by Petitioners.

In *Opdyke Inv. Co. v. City of Detroit*, 883 F.2d 1265, 1272-73 (6th Cir. 1989) the Court of Appeals decided that it was reasonable to apply the Local Government Antitrust Act of 1984 (15 U.S.C.A. at §§ 34 - 36) to litigation begun in 1978 under all the circumstances of the case.[28] In a section that appears to be *dictum* in light of the rest of the court's opinion, the Court of Appeals further affirms the district court's decision that the city's prosecution of a single lawsuit in State court which impeded the financing of a proposed alternative stadium for the Red Wings did not give rise to antitrust liability. The city lost the lawsuit, but its position was not frivolous.[29] The Court of Appeals simply ruled that there was no "sham" involved.

*Central Telecommunications v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. den.*, 480 U.S. 910 (1987)[30] substantially supports OMNI's direct position. The Court there wrote, in rejecting Defendants' position

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[28] The case had to do with the possible move of the Detroit Red Wings professional hockey team out of the City of Detroit to a site in Pontiac, Michigan.

[29] It is difficult to see how the act of the City of Columbia knowingly imposing an illegal moratorium could not be considered anything other than frivolous. *See supra*, p. 8.

[30] The case had to do with a city council's award of a cable television franchise.



that liability should have been excused due to *Noerr-Pennington*, that

> . . . the jury could properly have found, based on the facts and the court's instructions, that TCI's activities, more than being simply anti-competitive, were not genuine lobbying activities at all but instead were heavy-handed attempts to directly interfere with the business relationships of a competitor, *to disturb the political process* and to coerce the City into extending TCI's monopoly position, even though Central offered a superior cable system at lower cost. Much of TCI's 'lobbying' made no attempt to provide the City with information on which to base a reasonable choice but, instead, sought to subvert the franchising process. (800 F.2d at 722, n.11) (emphasis supplied).

The principle is the same as the one involved here: entities which *subvert* normal political processes, as Professor Areeda puts it, by accepting a bribe, deciding out of personal bias and for no other reason, or deciding in favor of a personal financial interest,[31] are not entitled to the protection given persons who invoke our political processes, even if those processes are invoked – properly – for base motives.

In *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n.*, 663 F.2d 253 (D.C. Cir. 1981), *cert. den.*, 455 U.S. 928 (1982), the D.C. Circuit simply found that there was no conspiracy when there was nothing other than formal associational ties involved (state pharmacy boards in many instances were made up of persons who were also members of their state pharmaceutical associations, private bodies; the underlying issue was Plaintiff Federal's desire to distribute prescription drugs by mail coupled with the Defendants' opposition to that activity)

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[31] *P. Areeda & H. Hovencamp, supra*, note 25.

and that certain litigation that had been undertaken was neither baseless nor frivolous. The Court wrote in relevant part:

> A different case would result were it shown that state board members were bribed by American, or met in an unlawful fashion with its officers, or were otherwise induced by American, *by means other than legitimate lobbying and publicity,* to take action against mail order houses. Evidence of this sort does not appear on the record. (663 F.2d at 266) (emphasis in original).

Since in the case at bar there was not "legitimate lobbying and publicity," this case once again actually favors OMNI's position, and shows that there is no split of authority among the Circuits.

The remaining cases cited by Petitioner, found at Pet., p. 15, n. 15, all deal with the "co-conspirator" exception to *Noerr-Pennington*.

The Fourth Circuit, of course, did not rely on the "co-conspirator" exception; instead it wrote: " . . . it is not necessary to consider the issue of whether there is a co-conspirator exception to *Noerr-Pennington* immunity." (Fourth Cir. Op., pp. 23a-24a). Although OMNI has consistently taken the position that there is a co-conspirator exception to the doctrine, and that it should apply here, the issue is not really present at this stage of the case.

In any event, the cases cited by Petitioners, again, do not support their position. OMNI must again draw attention to Petitioner's persistent failure to consider the factual setting of the jury's determination that COA's actions were a "sham." Thus, the Petition's assertion that the Fourth Circuit's position would undermine legitimate loboying is simply not credible. The cases cited by Petitioners are clearly distinguishable and in fact supportive of OMNI's position. Thus, in *Video Int'l Prod. v. Warner-*



*Amex Cable Communications, Inc.*, 858 F.2d 1075 (5th Cir. 1988), there was an allegation, in effect, that the City of Dallas imposed certain cable TV regulations because the City would obtain monies for the public fisc by being able to restrict franchising; these regulations would damage the Plaintiff and benefit another cable company, which would pay a fee to the City which the Plaintiff did not have to pay. Obviously this is considerably different from the implementation of a long-standing secret agreement between the City and COA to keep COA from having competition and keeping intact the advertising advantage enjoyed by the City Councilmen to the detriment of the public. Further, as the *Video Int'l* court wrote immediately following the portion of the opinion quoted by Petitioners in n. 15 of the Petition:

> Although WAX [Private Defendant] argues that the exception [to *Noerr-Pennington*] will not apply unless WAX used coercion or bribery to obtain its end, we do not believe the exception is so restricted. At the same time, however, we do find that the cases indicate that the official with whom the petitioner conspires must, at a minimum, have had *some selfish or otherwise corrupt motive in siding with the petitioner* to result in an illegal conspiracy sufficient to activate the co-conspirator exception. (858 F.2d at 1083) (emphasis supplied).

This case offers no support to Petitioners' position.

Neither does *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir. 1988). The Court notes that the allegations made (this was a case dismissed on motion) were too sketchy and conclusory, and never involved any assertion that any acts there involved were

undertaken for any purpose "other than *legitimate* petitioning of government." (841 F.2d at 894) (emphasis supplied). In other words, the Plaintiff apparently – and unlike in the case at bar – had no proof that (or at least made no allegation that) the activities of the Defendants were anything other than "legitimate" political activity. Thus, the case did not address the kind and nature of conspiracy and illicit activity proved to have been involved in the case at bar.

*Westborough Mall, Inc. v. City of Cape Girardeau, Mo.*, 693 F.2d 733 (8th Cir. 1983) (*en banc*) said that *Noerr-Pennington* extended to protect "legitimate use of the political process" (693 F.2d at 746), and then specifically reversed a summary judgment in favor of the City and private Defendants "[b]ecause the plaintiffs have presented facts that support an inference of unlawful conduct – city officials may have been induced by the May-Drury defendants by means other than legitimate lobbying to illegally revert plaintiffs' C-4 zoning – the *Noerr* doctrine may not be relied upon to support the district court's grant of summary judgment." (*Id.*). The evidence, outlined at pp. 743 through 745 of 693 F.2d, involved "the close relationship between defendant Drury and city officials, the defendants' concern about the progress of plaintiffs' competing site, Drury's notes to 'stop them from building so maybe we get a chance to build,' and the timing of the reverter of plaintiffs' C-4 zoning only two days after the city council enacted an ordinance that allowed the West Park Mall developers to begin construction." (*Id.* at 743). Clearly the evidence in the case at bar much more effectively demonstrates "illegitimate" conspiratorial activity than does the evidence in *Westborough Mall*. This case substantially supports OMNI.



Finally, Petitioners again cite *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). That case is very much unlike the present one; the Seventh Circuit began its *Noerr* analysis by noting that "[t]his is **not** a case in which the agency of government itself is alleged to be a part of the conspiracy. . . ." (516 F.2d at 229) (emphasis supplied). Of course, in the case at bar the situation is precisely the opposite. Further, the Seventh Circuit's principal discussion of the point indicates that the mayor and one alderman of the city were persuaded by private defendants to support their application for a CATV franchise, and that the mayor and alderman received from the private applicants $50.00 in campaign contributions. (*Id.* at 230). Although Petitioners try to analogize this situation to the one in the case at bar, OMNI respectfully submits that the fact that the City of Columbia was found to be a conspirator by the jury, as well as the webwork of interconnections between COA and the various members of the City government, combined with the demonstrated illicit self-interest on the part of all those officials and persons involved (worth much more than $50.00), amply distinguish this situation from that in *Metro Cable*. In addition, the Defendants undertook acts other than regulatory in implementing their long-standing secret agreement to create restrictive measures to ensure COA's monopoly position. The Mayor verbally attacked OMNI in the news and on the radio (Tr. 224, 356, 1082) and the City made OMNI take down billboards while letting COA keep offensive billboards (Tr. 2074-2076, 3317). COA had a campaign to discredit OMNI (Tr. 506, 822, 1091). COA gathered scandalous information about Mr. Dooner of OMNI (Tr. 2691-2693), and, of course, COA used its agreement with the City in concert with its "double billing" or

stealing in order to further block OMNI's entrance into the market. (e.g. Tr. 3346, 3349, 3353 and 3355).

As this Court wisely pointed out only two terms ago, " . . . *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931, 1939 (1988). In that case, this Court refused to accord *Noerr-Pennington* immunity to the activities of the Defendant/Petitioner in affecting the product-standard-setting processes of a private association whose decisions were generally widely adopted by state and local governments. Justice Brennan, speaking for seven Justices, rejected an "absolutist" view of *Noerr:*

> We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. . . . [I]t is [not] . . . dispositive that packing the Association's meeting may have been the most effective means of securing government action, for one could imagine situations where the most effective means of influencing government officials is bribery, and we have never suggested that that **kind** of attempt to influence the government merits protection. (*Id.* at 1938-1939) (emphasis supplied).

In the case at bar, we have, as has repeatedly been emphasized and as Petitioners wish to ignore, that "kind" of activity. As Justice White in dissent pointed out in *Allied Tube*: "the *Noerr* immunity is not unlimited and by its terms is unavailable where the alleged efforts to influence legislation are nothing but a sham." (*Id.* at 1945). That is the OMNI case.

The fact is, thus, that the Petitioners' second question is a non-question in the context of this case, one which is



not presented by the facts nor supported in the Fourth Circuit's analysis of the case.

## CONCLUSION

The only meaningful message that the Fourth Circuit's decision sends to the community is that it is sanctionable under the antitrust laws to corrupt and subvert the political and market processes for private anticompetitive purposes and gain. There is nothing new about this, and nothing wrong with it. The plain and simple fact is that the Defendants got caught in their unusual but mutually beneficial destruction of competition and subversion of the processes of representative government on a local level, and were told to pay for these actions by a jury. The jury's decision was rendered almost four and a half years ago. There is nothing in the case of sufficient national significance to warrant utilizing the limited resource of the time of this Honorable Court and/or delaying justice still longer.

The Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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